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IN THE
COURT OF APPEALS OF INDIANA

BOB ANDERSON PONTIAC d/b/a MIKE ANDERSON CHEVROLET OF MERRILLVILLE, INC.,	)	
Appellant,	)	
vs.	)	No. 93A02-0610-EX-854
THE INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT,	)	
Appellee.	)	

APPEAL FROM THE INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT
Case No. 06-06090

May 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Bob Anderson Pontiac, Inc. d/b/a Mike Anderson Chevrolet of Merrillville, Inc. ("Anderson Pontiac") appeals a decision of a Liability Administrative Law Judge ("LALJ") concluding that Anderson Pontiac became a "successor employer" for purposes of calculating its contribution to the Unemployment Insurance Benefit Fund ("Fund"),[1] by purchasing certain assets of Shaver Motors, Inc. ("Shaver Motors"). We affirm.

Issues

Anderson Pontiac raises two issues on appeal, which we reorder and restate as:

(1) Whether the LALJ erred in concluding that it was not necessary to include Shaver Motors as a party, and

(2) Whether the LALJ erred in concluding that Anderson Pontiac acquired substantially all the assets of Shaver Motors.

Facts and Procedural History

Shaver Motors was in the business of auto sales, auto service, and insurance, operating from a location in Merrillville. Meanwhile, Anderson Pontiac had been in the business of auto sales and auto service since 1969. In October, 2005, Anderson Pontiac agreed to purchase certain assets of Shaver Motors and began offering auto sales and auto service from the same location.

Shaver Motors submitted a form to the Indiana Department of Workforce Development ("Department"), entitled "Report of Transfer – Complete Sale" ("Complete Sale Form"). Appendix at 2. On the Complete Sale Form, Shaver Motors marked a box labeled, "Sale of Complete organization." Id. The Department notified Anderson Pontiac

that it had become the "successor employer" for purposes of calculating its contribution to the Fund. Id. at 3. Anderson Pontiac filed a written Protest, objecting to the Department's determination and seeking a hearing on the issue. In so doing, Anderson Pontiac stated that it did not know that Shaver Motors had submitted the Complete Sale Form. Also, it attached a "Report of Transfer – Partial Sale" form ("Partial Sale Form"), in which Shaver Motors stated that it had disposed of 95% of its operations in the transfer to Anderson Pontiac. Id. at 1.

During the hearing, Anderson Pontiac objected to the fact that Shaver Motors had not been joined as a party. The LALJ took the objection under advisement, concluded hearing the evidence, and later issued his Decision denying Anderson Pontiac's Protest. This appeal ensued.

Discussion and Decision

I. Absence of Shaver Motors as a Party

Anderson Pontiac argues that the LALJ erred as a matter of law in concluding that it was not necessary to include Shaver Motors as a party. Presented with a question of law, our review is de novo. LinkAmerica Corp. v. Albert, 857 N.E.2d 961, 965 (Ind. 2006).

Anderson Pontiac bases its argument on Indiana Code § 22-4-11.5-7(d), providing that the "predecessor employer and successor employer shall be parties to the hearing . . . ." The General Assembly enacted this chapter during the 2005 Session, applicable "to the assignment of contribution rates and transfers of employer experience accounts after

[1] See Ind. Code § 22-4-26-1.

December 31, 2005."[2] Ind. Code § 22-4-11.5-1. The statute does not define explicitly the date of the "assignment of contribution rates and transfers of employer experience accounts." Where a statute is ambiguous, "our primary goal of statutory construction is to determine, give effect to, and implement the intent of the legislature." Sees v. Bank One, Indiana, N.A., 839 N.E.2d 154, 157 (Ind. 2005). In interpreting the language of one section, we must construe it with due regard for all other sections of the act. Capehart v. Capehart, 771 N.E.2d 657, 661 (Ind. Ct. App. 2002). Section 7 of the same chapter, upon which Anderson Pontiac relies, provides that "contribution rates of both employers shall be recalculated, and the recalculated rate made effective on the effective date of the transfer."

Here, there is no dispute that the transfer occurred in October, 2005. In light of the language in Section 7, making the recalculation effective on the date of the transfer, we conclude that Section 1 makes this chapter applicable to all such transfers occurring after January 1, 2006. Accordingly, this chapter is not applicable here.[3]

Alternatively, Anderson Pontiac argues in its Reply Brief that Shaver Motors was an interested party for purposes of the statutes governing this administrative adjudication or that Shaver Motors was a necessary or indispensable party under Indiana Trial Rule 19. The LALJ shall notify interested parties of the hearing date. Ind. Code § 22-4-32-5. An interested party is "any person appearing to the [LALJ] to be necessary or indispensable

[2] See P.L.98-2005.

[3] Also, it is not clear that the General Assembly intended Section 7 to apply to this transfer, regardless of the date. Subsection (a), as originally enacted, applied only to transfers in which the predecessor and successor employer had "substantially common ownership, management, or control." P.L.98-2005. An amendment a year later made clear that the entire section applied only to transfers between such organizations. P.L.108-2006. There is no evidence that Anderson Pontiac and Shaver Motors shared ownership, management or

to the determination of the issues involved in the hearing." Ind. Code § 22-4-32-6. No reported case applies or interprets either section.[4] Accordingly, we rely upon T.R. 19 in analyzing this issue.

T.R. 19 provides as follows:

> (A) A person who is subject to service of process shall be joined as a party in the action if:
>
> (1) in his absence complete relief cannot be accorded among those already parties; or
>
> (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:
>
> (a) as a practical matter impair or impede his ability to protect that interest, or
>
> (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.
>
> If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant.
>
> (B) Notwithstanding subdivision (A) of this rule when a person described in subsection (1) or (2) thereof is not made a party, the court may treat the absent party as not indispensable and allow the action to proceed without him; or the court may treat such absent party as indispensable and dismiss the action if he is not subject to process. In determining whether or not a party is indispensable the court in its discretion and in equity and good conscience shall consider the following factors:
>
> (1) the extent to which a judgment rendered in the person's absence might be prejudicial to him or those already parties;
>
> (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;

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control.

[4] In the only case citing either of these sections, this Court relied on a separate statute in concluding that the director of the predecessor agency had a right to appeal a referee's decision. Fields v. Review Bd. of Ind. Emp. Sec. Div., 179 Ind. App. 381, 385 N.E.2d 1168, 1170-72 (1979).

(3) whether a judgment rendered in the person's absence will be adequate;
(4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Anderson Pontiac makes no argument that the absence of Shaver Motors prevented the parties from being accorded complete relief. To the contrary, the sole function of the litigation was to determine Anderson Pontiac's status for purposes of calculating its contribution to the Fund. Nor does Anderson Pontiac assert how it will be subject to inconsistent obligations by virtue of the predecessor's absence. Anderson Pontiac asserts that it was prejudiced by the absence of Shaver Motors, arguing simply that it "was forced to stand alone at the hearing and defend its interests, which exposed it to 100% of the unemployment experience liability." Reply Br. at 11. The analysis of this issue, infra, would be no different if Shaver Motors had been included as a party before the LALJ. Accordingly, we conclude that Anderson Pontiac has failed to demonstrate that the LALJ erred as a matter of law by deciding the case without Shaver Motors participating as a party.

II. Anderson Pontiac Purchased Substantially All of Shaver Motors' Assets

Anderson Pontiac further argues that the LALJ erred as a matter of law in concluding that it had purchased substantially all of the assets of Shaver Motors. A decision of the LALJ is conclusive and binding as to all questions of fact. Ind. Code § 22-4-32-9. An assignment of errors that the decision is contrary to law shall be sufficient to present both the sufficiency of the facts found to sustain the decision, and the sufficiency of the evidence to sustain the finding of facts.[5] Ind. Code § 22-4-32-12. In considering similar provisions of the

[5] Anderson Pontiac filed its Assignment of Errors, challenging the same conclusions as discussed on appeal.

Unemployment Compensation Act, the Indiana Supreme Court described our review as follows:

> In sum, basic facts are reviewed for substantial evidence, legal propositions are reviewed for their correctness. The best that can be said for ultimate facts or "mixed questions" as a general proposition is that the reviewing court must determine whether the Board's finding of ultimate fact is a reasonable one. The amount of deference given to the Board turns on whether the issue is one within the expertise of the Board.

McClain v. Review Bd. of Ind. Dep't of Workforce Dev., 693 N.E.2d 1314, 1318 (Ind. 1998).

Indiana Code § 22-4-10-6(a)(2) provides that when an employer acquires "substantially all the assets of another employer," the successor employer shall "assume the position of the predecessor with respect to all the resources and liabilities of the predecessor's experience account."[6] This Court has noted that the phrase "substantially all" is not a fixed percentage, but an elastic term. Astral Indus., Inc. v. Ind. Emp. Sec. Bd., 419 N.E.2d 192, 197 (Ind. Ct. App. 1981) (quoting Harris v. Egan, 60 A.2d 922, 924 (Conn. 1948)) (holding that accounts receivable do not constitute assets for purposes of this statute).[7] Significantly, the parties do not dispute that Shaver Motors completed two Department forms; initially, a Complete Sale Form, in which Ronald Shaver indicated that the transfer constituted a "Sale of Complete organization" and later, a Partial Sale Form, in which he indicated that 95% of Shaver Motors's operations were included in the transfer. App. at 25.

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[6] Each year, the Department calculates a contribution rate for every employer in Indiana. Employers contribute to the Fund from their experience accounts. See Ind. Code §§ 22-4-11-1 to -4.

[7] This is the only reported case citing Ind. Code § 22-4-10-6.

Finally, the contract lists various assets included in the sale, including new vehicle inventory, used vehicle inventory, new parts, customer lists, real estate, furniture, Shaver Motors's rights as a franchised Chevrolet dealer, and the right to use the insignia of Shaver Motors for two years.[8] Given this evidence, we conclude that substantial evidence supported the LALJ's findings and the LALJ's conclusion that Anderson Pontiac purchased substantially all of Shaver Motors's assets was reasonable.

Conclusion

We conclude that the LALJ did not err in deciding the case without the predecessor employer as a party or in concluding that Anderson Pontiac acquired substantially all of the assets of Shaver Motors.

Affirmed.

SHARPNACK, J., and MAY, J., concur.

[8] While the seller in this contract was Shaver Motors, the buyer was "Timothy Roper and/or his assigns." Dep't Ex. 1 at 1. There is no evidence in the Record regarding the relationship of or any agreements between Roper and Anderson Pontiac. However, Anderson Pontiac's controller testified in the hearing that, "[t]his was our agreement for the sale." App. at 22. Anderson Pontiac objected to its admission, but does not assert this issue on appeal.